

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

W.L. RITTER

E.S. WHITE

B.G. FILBERT

UNITED STATES

v.

**Jonathan E. LEE
Captain (O-3), U.S. Marine Corps**

NMCCA 200600543

Decided 26 June 2007

Sentence adjudged 4 May 2005. Military Judge: S.F. Day. Staff Judge Advocate's Recommendation: LtCol M.A. Lawrence, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.

EUGENE R. FIDELL, Civilian Appellate Defense Counsel
BRENT C. HARVEY, Civilian Appellate Defense Counsel
LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel
LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

A military judge sitting as a general court-martial, convicted the appellant, contrary to his pleas, of three specifications of burglary, conduct unbecoming an officer, fraternization, and five specifications of indecent assault. The appellant was also convicted, pursuant to his pleas, of two specifications of fraternization. His offenses violated Articles 129, 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 929, 933, and 934. The convening authority approved the adjudged sentence of confinement for three years, dismissal, and forfeiture of all pay and allowances.

The appellant raises five assignments or error, claiming: (1) the evidence was legally and factually insufficient to support his convictions on two of the three specifications of burglary, four of the five specifications of indecent assault,

and that part of the conduct unbecoming an officer specification alleging burglary and indecent assault; (2) the military trial defense counsel's failure to disclose a conflict of interest resulted in an uninformed and invalid election of counsel; (3) the conduct unbecoming an officer charge is multiplicitous with the offenses of burglary and indecent assault and should be dismissed; (4) the sentence is disproportionately severe; and (5) the lack of a fixed term of office for Navy and Marine Corps judges violates his due process and equal protection rights. The appellant also submitted a Petition for a New Trial on the basis of newly discovered evidence, which we deny for the reasons set forth below.

We have carefully examined the record of trial, the appellant's brief, reply brief and petition for a new trial, and the Government's answer. We find merit in the appellant's contention that the evidence was not factually sufficient to sustain his conviction for one of the specifications of indecent assault. We also conclude that dismissal of the conduct unbecoming an officer charge (Charge II) is warranted because it is multiplicitous with the offenses of burglary and indecent assault. After taking corrective action in our decretal paragraph with respect to these two offenses and reassessing the sentence, we conclude that the remaining findings and the reassessed sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.¹

Legal and Factual Sufficiency

The appellant contends that the evidence is legally and factually insufficient to support his conviction on two of the three specifications of burglary, four of the five specifications of indecent assault, and that part of the conduct unbecoming an officer specification alleging burglary and indecent assault. We agree with the appellant's contention that the evidence is factually insufficient to sustain his conviction for indecently assaulting Sergeant (Sgt) J. We find that the evidence is legally and factually sufficient to convict the appellant of the remaining offenses.

Facts

Fifty to sixty Marines, including twenty to thirty officers, attended a Professional Military Education (PME) course given in

¹ The appellant's motion of 20 November 2006 for oral argument in this case is hereby denied.

Londonderry, Ireland over the weekend of 9-12 January 2004. The purpose of the trip was to commemorate and learn about the contributions of Marines who served in Northern Ireland during World War II. All of the Marines stayed in the Beech Hill Country House Hotel in Londonderry during the weekend.

On Friday evening 9 January 2004, the appellant went with a group of enlisted Marines to several bars in Londonderry. The appellant was the only officer in the group of Marines. When the appellant arrived back at the hotel at approximately 0200, he continued to drink at the hotel bar with other Marines. Eventually, five Marines, including the appellant, Corporal (Cpl) K, Sgt J, Lance Corporal (LCpl) Natalie Christofferson and Sgt Robert Dugan, went to sit in a hot tub in the hotel.

The hot tub was small, causing everyone to sit close to each other. Cpl K testified that while sitting in the hot tub he felt something touch his testicles and that he saw appellant's leg stretched across the hot tub and his foot touching Cpl K's testicles. He gave the appellant a stern look and shook his head to let the appellant know he was not comfortable with the situation. Cpl K testified that the appellant was looking at him while he was touching his testicles as if waiting for a reaction. After Cpl K looked at him and shook his head, the appellant retracted his leg.

After this incident and while still in the hot tub, the appellant grabbed Cpl K's legs and pulled Cpl K towards him on three different occasions. Each time, Cpl K pushed the appellant away. LCpl Christofferson and Sgt J both corroborated that the appellant grabbed the legs of Cpl K. Sgt J testified that Cpl K appeared uncomfortable with the actions of the appellant.

Sgt J testified that while sitting in the hot tub directly across from the appellant, he felt a hand touch his foot for a brief second, which caused him to quickly pull his foot away. He testified that he believed that it was the appellant who touched his foot because he was the only person sitting close to him. Sgt J could not tell if the touching was an accident or not. After a few moments, Sgt J placed his foot back where it had been. The appellant then touched Sgt J's foot with his hand. Sgt J pulled his foot back and then left the tub because he felt uncomfortable.

Cpl K testified that after everyone had exited the hot tub he confronted the appellant and told him "don't ever do it again

or else I am going to kick your ass or kill you." Record at 239. Cpl K testified that he later returned to his room where he found the appellant lying on the ground in between the two beds looking up at him as though he was lying in wait. Cpl K testified he then grabbed the appellant by the arm and escorted him out of the room.

On the same night in the early morning hours, the appellant was in the hotel room shared by Sgt B, Staff Sergeant (SSgt) J.R. Forbes, Sgt David Anderson, and Sgt Christopher Rager. An Irish national, Bridgette Kelly, was also in the hotel room for part of the night. The evidence established that Sgt B was intoxicated at the time of the events in question. While in Sgt B's room, the appellant introduced conversations about pornographic materials and sexual situations. After spending some time in the hotel room, the appellant left. After Sgt B went to sleep, he was awakened by the appellant "playing with my penis, like, stroking my penis." Record at 167. Sgt B jumped out of his own bed to get away and into Sgt Anderson's bed. Sgt Anderson pushed him out of his bed and Sgt B fell between the beds. Sgt B then got up and told the appellant to stop. The appellant continued to touch his leg, hand and shoulder, and told Sgt B to "shoosh." Record at 168. Sgt B grabbed the appellant by the throat and pushed him back, and the appellant left the room. The hotel room was dark during the assault on Sgt B and the ensuing altercation between Sgt B and the appellant.

Sgt Rager stated that he heard some kind of scuffle between Sgt B and the appellant during the night. Sgt Forbes and Sgt Anderson corroborated that at some point Sgt B jumped into Sgt Anderson's bed. Sgt Anderson testified that, after Sgt B left the bed, Sgt Anderson heard Sgt B say something to the effect of "no" or "stop it." Record at 223. Sgt Anderson testified that he had no recollection of the appellant ever being in the hotel room. SSgt Forbes testified that because there was only one key to the room, a towel was used to prop the door open and that it stayed that way all night.

Cpl M and Cpl S were roommates at the hotel. On Sunday evening, 12 January 2004, Cpl M went to a club in Londonderry and returned to the hotel around midnight. He attempted to go to the hot tub but was met by the appellant, who told him the hot tub was not working. Cpl M went to the room of two enlisted Marines, where he talked with the Marines and three Irish women. He returned to his own room with one of women. Cpl M was on the bed with the woman with the lights out when he was startled to

discover the appellant rubbing his chest and the lining of his boxers. Cpl M yelled and chased the appellant out of the room. The appellant does not challenge the factual sufficiency of the specifications emanating from this incident.

Cpl S testified that on Sunday night he returned to the hotel after a night of drinking in Londonderry. He went to the hotel bar, where he chatted with the appellant. After about an hour, Cpl S and the appellant went to the hot tub area. Cpl S went to his room first to put on some shorts. When he returned, he found the appellant at the hot tub area. At that point, Cpl S started to feel "kind of fuzzy and hazy" and he blacked out from drinking. Record at 274. When he came to, Cpl S was lying inside the sauna wearing only a towel, and the appellant was massaging his stomach. The appellant, who also wore only a towel, asked Cpl S to roll over. At that point, Cpl S left the sauna and went to the bathroom. After collecting his thoughts in the bathroom, he went back out to the main area of the gym to find his clothes. The appellant followed Cpl S back to his room.

After his encounter with the appellant, Cpl M told Sgt Michael Hjelmstad what the appellant had done to him. Sgt Hjelmstad advised Cpl M that he had just seen the appellant walking down the hall with Cpl S. Cpl M gave Sgt Hjelmstad the only key to the room he shared with Cpl S and told him to lock Cpl S in the room. Sgt Hjelmstad found Cpl S leaning against the door to his room and he appeared very intoxicated. Sgt Hjelmstad used the key he obtained from Cpl M to open the door. The appellant appeared next to him and said "I got it, I will help him in" and tried to enter the room. Record at 334. Sgt Hjelmstad argued with the appellant and said he would take care of it and the appellant left.

Law

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact finder could have found all the necessary elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Reasonable doubt does not, however, mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 229, 562 (N.M.Ct.Crim.App. 1997), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A fact-finder may believe one part of a witness' testimony and

disbelieve another. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

The elements of burglary, in violation of Article 129, UCMJ, are:

(1) That the accused unlawfully broke and entered the dwelling house of another;

(2) That both the breaking and entering were done in the nighttime; and

(3) That the breaking and entering were done with the intent to commit an offense punishable under Articles 118 through 128, except Article 123a.

MANUAL FOR COURTS MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 55.

The elements of indecent assault, in violation of Article 134, UCMJ, are:

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

(3) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, ¶ 63.

Analysis

1. Offenses Pertaining to Cpl K and Sgt J

We find the evidence both clear and persuasive that the appellant committed indecent assaults when he purposely touched Cpl K's testicles with his leg and grabbed Cpl K by the legs in the hotel hot tub. The corroborating testimony of others in the hot tub and the action of Cpl K after the assaults took place fully support the conclusion that the appellant purposely committed these acts with respect to Cpl K and did so with the intent to gratify his sexual desires.

Further, we find Cpl K's testimony that he later found the appellant laying in wait in Cpl K's room to be highly credible. The appellant's earlier touching and grabbing of Cpl K in the hot tub is strong evidence that his intent in secretly entering the room of Cpl K was to again indecently assault him. *United States v. Simpson*, 56 M.J. 462, 464 (C.A.A.F. 2002).

After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, we ourselves are not convinced beyond a reasonable doubt that the appellant's brief touching of Sgt J's foot on two occasions constituted indecent assaults. These two incidents occurred in a crowded hot tub and each lasted for no more than a split second. The record does not provide sufficient facts to establish that the appellant intentionally touched Sgt J or that the appellant had the requisite intent to gratify his sexual desire. We therefore find the evidence legally and factually insufficient to support the finding of guilty to this specification.

As to the offenses of burglary, indecent assault, and conduct unbecoming an officer pertaining to Cpl K, we have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of these offenses. Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt for these offenses.

2. Offenses Pertaining to Sgt B

The appellant's assertion that the evidence was factually insufficient to prove that he unlawfully entered the room of Sgt B and indecently assaulted him is unconvincing. The evidence was clear that the appellant was drinking in the hotel room of Sgt B and that he left the room while others, including Sgt B, remained in the room. Sgt B testified that he awoke to find the appellant stroking his penis and that he then jumped into the bed of Sgt Anderson.

While it is clear that Sgt B was intoxicated and could not recall certain events of the evening, the other Marines staying in the room corroborated important parts of his testimony. Sgt Rager overheard the scuffle between the appellant and Sgt B and heard Sgt B say to the appellant, "If you ever do that again, I will kick your ass." Record at 196. Sgt Forbes and Sgt

Anderson each testified that at some point Sgt B jumped into Sgt Anderson's bed. Additionally, Sgt Anderson testified that he heard Sgt B say "no" or "stop it" in the middle of the night. Record at 223. Moreover, the record does not suggest any motive to fabricate on the part of Sgt B.

As to the offenses of burglary, indecent assault, and conduct unbecoming an officer pertaining to Sgt B, we have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of these offenses. Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt for these offenses.

3. Offenses Pertaining to Cpl S

We find the evidence convincing that the appellant indecently assaulted Cpl S by massaging his stomach while he was wearing nothing but a towel. Based on the testimony of Cpl S alone, it was reasonable for the military judge to conclude that the appellant performed these acts for the purpose of gratifying his sexual desires. This conclusion is also supported by the fact that the appellant later attempted to gain access to the drunken Marine's room before being stopped by Sgt Hjelmstad. Moreover, the appellant's earlier conduct in laying in wait in the room of Cpl K and in indecently assaulting Sgt B and Cpl M demonstrates his intent to take sexual advantage of unsuspecting enlisted Marines such as Cpl S. *Simpson*, 56 M.J. at 464.

As to the offenses of indecent assault and conduct unbecoming an officer pertaining to Cpl S, we have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of these offenses. Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt for these offenses.

Conflict of Interest of Trial Defense Counsel

The appellant contends that his military trial defense counsel failed to disclose a conflict of interest in acting as a prosecutor in another case at the time of the appellant's trial. He urges us to set aside the findings and sentence on the basis

that this situation resulted in an invalid election of counsel by the appellant. We disagree and decline to grant the requested relief.

Facts

The appellant contends that his military trial defense counsel, Capt Reh, failed to disclose that while the appellant's trial was in progress, he was also serving as assistant trial counsel in a prosecution for which the lead prosecutor was the trial counsel in the appellant's case, Maj Keane. The appellant claims that the two counsel worked together as prosecutors in an Article 32, UCMJ, proceeding the week before the appellant's trial. The appellant alleges that he did not learn of this situation until after his court-marital proceedings were completed. The appellant concedes that Capt Reh informed him in February 2005 that Capt Reh would be prosecuting minor offenses involving drugs and unauthorized absences as he transitioned off of active duty. The appellant also concedes that, based on this disclosure, he agreed that Capt Reh should continue to represent him. The appellant was also represented by civilian counsel throughout the proceedings.

Law

A military accused is guaranteed the right to effective assistance of counsel under the Sixth Amendment and Article 27, UCMJ. *United States v. Fluellen*, 40 M.J. 96, 98 (C.M.A. 1994). This right includes the right to counsel free from conflicts of interest. *United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994). To demonstrate a Sixth Amendment violation, the appellant must establish (1) an actual conflict of interest, and (2) that this conflict adversely affected his lawyer's performance. *United States v. McClain*, 50 M.J. 483, 488 (C.A.A.F. 1999).

Analysis

We find this assignment of error to be without merit. We find no actual conflict of interest in this case. The appellant acknowledges that Capt Reh advised that he would be prosecuting cases at the same time he was representing the appellant. Following this disclosure, the appellant decided that he wanted Capt Reh to continue to represent him, along with civilian counsel. The mere fact that Capt Reh ultimately worked as a trial counsel on a different case with the trial counsel on appellant's case does not by itself create an actual conflict of

interest. Moreover, the appellant fails to identify any connection between the fact that Capt Reh and Maj Keane worked together as prosecutors on a completely unrelated case and the representation he received at his court-martial. To the contrary, all evidence in the record indicates that the appellant received excellent representation from his civilian and military trial defense counsel throughout the court-martial process. Additionally, the appellant's civilian counsel was the lead counsel throughout the appellant's trial.

The appellant urges us to apply an "inherent prejudice" standard to his case. Certain cases involving concurrent representation of multiple clients have been treated as inherently prejudicial. See *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980). Also, in *United States v. Cain*, 59 M.J. 285, 295 (C.A.A.F. 2004), our superior court found that the situation in that case was inherently prejudicial because it involved "an attorney's abuse of a military office, a violation of the duty of loyalty, fraternization, and repeated commission of the same criminal offense for which the attorney's client was on trial," all of which was left unexplained as a result of defense counsel's suicide. *Cain* advised, however, that "most cases will require specifically tailored analyses in which the appellant must demonstrate both the deficiency and prejudice under the standards set by *Strickland*." 59 M.J. at 294. We find that the application of an inherent prejudice standard to this case is clearly not warranted under existing case law. *United States v. Nicholson*, 15 M.J. 436, 438 (C.M.A. 1983); *United States v. Hubbard*, 43 C.M.R. 322, 325 (C.M.A. 1971); see *Cain*, 59 M.J. at 294.

Conclusion

Because the appellant has failed to establish the existence of any actual conflict of interest and failed to show that the alleged conflict adversely affected his military trial defense counsel's performance, we find no merit in this assignment of error.

Multiplicity

The appellant contends, and the Government agrees, that the conduct unbecoming an officer charge (Charge II) is multiplicitious with the burglary, fraternization and indecent assault offenses and should be dismissed. We agree and will take action in our decretal paragraph. See *United States v.*

Palagar, 56 M.J. 294, 297 (C.A.A.F. 2002); *United States v. Cherukuri*, 53 M.J. 68, 73-74 (C.A.A.F. 2000).

Other Assignments of Error

We have also considered the appellant's contentions that: (1) the adjudged sentence of three years confinement, forfeiture of all pay and allowances and dismissal is disproportionately severe; and (2) his equal protection and due process rights have been violated because there are no fixed terms of office of military or appellate judges in the Navy and Marine Corps. We find no merit in either of these contentions.

The appellant would have us view his actions as a simple lapse in judgment fueled by alcohol and a party-like atmosphere. The evidence showed, however, that he sexually assaulted five different enlisted Marines over the course of a weekend. Also, the two fraternization specifications to which the appellant pled guilty related to conduct that occurred in the fall of 2003. He also claims that his sentence is disproportionate to similar cases decided by this court. However, the appellant fails to demonstrate that the two cases he cites are closely related to his case. His brief contains only a brief recitation of the charges in these cases, with no discussion of the facts affecting the sentences. We have carefully considered the entire record, including the evidence of the appellant's service, and find that that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant contends that because there are no fixed terms of office of military or appellate judges in the Navy and Marine Corps, but there are fixed terms for military and appellate judges in the Army and Coast Guard, that his equal protection and due process rights have been violated and his conviction must be set aside. We disagree. This assignment of error has been previously raised and rejected by this Court and by our brethren on the Air Force Court of Criminal Appeals. See *United States v. Gaines*, 61 M.J. 689, 692 (N.M.Ct.Crim.App. 2005), *aff'd*, 64 M.J. 176 (C.A.A.F. 2006); *United States v. Belkowitz*, No. ACM 36358, 2006 CCA LEXIS 345, unpublished op. (A.F.Ct.Crim.App. 20 Dec. 2006); see also *Weiss v. United States*, 510 U.S. 163 (1994); *United States v. Graf* 35 M.J. 450 (C.M.A. 1992). We therefore find no merit in it based on the authorities cited above.

Petition for New Trial

The appellant seeks a new trial, claiming that an affidavit from Bridgette Kelly,² executed after his trial was completed, constitutes newly discovered evidence. The affidavit from Ms. Kelly, which is referenced in but not attached to the petition, allegedly states that she does not remember the appellant returning to Sgt B's room and does not remember any incident or altercation while she was in Sgt B's room.

A new trial shall not be granted on the basis of newly discovered evidence unless the petition demonstrates that:

- (1) The evidence was discovered after the trial;
- (2) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
- (3) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a more favorable result for the accused.

RULE FOR COURTS-MARTIAL 1210(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Petitions for a new trial are "generally disfavored." *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998)(quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)). "They should be granted only if a manifest injustice would result absent a new trial ... based on proffered new evidence." *Id.* A reviewing court will judge the credibility and materiality of the new evidence, and in so doing will weigh the "testimony at trial against the post-trial evidence to determine which is credible." *United States v. Sztuka*, 43 M.J. 261, 268 (C.A.A.F. 1995)(citing *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982)); *United States v. Brozaukis*, 46 C.M.R. 743, 751 (N.M.C.M.R. 1972).

In this case, the evidence at issue falls far short of satisfying the standards for a new trial based on newly discovered evidence. First, the affidavit of Ms. Kelly is not attached to the appellant's petition for a new trial. Thus, we have no factual basis to assess whether Ms. Kelly's statements actually constitute newly discovered evidence. Second, assuming

² The petition for a new trial refers to Bridgette Kelly as "Brid Kelly."

that Ms. Kelly's affidavit actually exists and contains the statements described in the appellant's petition, such evidence clearly could have been discovered by the appellant at the time of trial in the exercise of due diligence. Ms. Kelly's existence as a witness was well known to the appellant and his counsel prior to trial. The fact that an Irish counsel hired after trial was able to obtain a statement from this known witness demonstrates that such evidence could have been discovered with due diligence prior to the appellant's trial. Finally, given circumstances in the dark hotel room at the time the appellant indecently assaulted Sgt B, it does not surprise us that Ms. Kelly was not aware of the incident between the appellant and Sgt B. Moreover, the testimony of Sgt B and the witnesses in the room who corroborate his version of events, leads us to find it improbable that this new evidence would produce a more favorable result for the appellant at a new trial.

We therefore deny the appellant's petition for a new trial.

Conclusion

We set aside the findings of guilty, and dismiss Charge II and the sole specification thereunder, and Specification 8 of Charge III. We affirm the remaining findings, as approved by the convening authority. We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986). In view of the remaining offenses, and taking into account the military judge's action in merging Charge II for sentencing, we are satisfied that the military judge would have adjudged no lesser punishment for the remaining charges and specifications. Accordingly, we affirm the sentence approved by the convening authority.

Senior Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court